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EXAMINER	
RUHL, DENNIS WILLIAM	
ART UNIT	PAPER NUMBER
3689	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	09/853,196	HAJDUKIEWICZ ET AL.	
	Examiner	Art Unit	
	Dennis Ruhl	3689	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 December 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *31,38-41,55,61,65-68 and 115* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *31,38-41,55,61,65-68 and 115* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/9/09 has been entered.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. Claims 31,38-41,55,61,65-68,115, are rejected under 35 U.S.C. 103(a) as being unpatentable over McCall et al. (6321984) in view of "Infinity" and further in view of "Weather futures bet will give Tucson forms a hedge against loss". The prior art of record is seen as being representative of the level of ordinary skill in the art.

For claims 31,55,61,115, McCall discloses a system and method for selling vehicle fuel to customers. The vehicle fuel is inherently going to be sold at a price and that price is necessarily going to be decided upon by the operator of the retail establishment that is selling the vehicle fuel, this will be explained in more detail later. McCall discloses that fuel can be sold to consumers at discounted prices by using various types of incentives and/or customer loyalty

types of programs. In column 4, lines 12-23, it is disclosed that the system of McCall includes a database 40 that contains records pertaining to its customers. It is disclosed "*For example, the store may be a member-oriented retail outlet, and a record for each customer indicates that the customer is a member and a "level" of benefits or privileges that the customer may receive. One level may indicate a first discount to the customer of the goods he purchases while another level may indicate a second discount.*" The level of benefits or privileges is a type of "customer condition" as has been newly added to the claims. The database 40 stores the information regarding the type of discount that the customer is entitled to and the relevant information pertaining to their participation in the loyalty program they are enrolled in. Example C discloses a situation where a customer is entitled to certain benefits that result in a 10 cents per gallon discount. McCall also discloses that a discount can be given for fuel based on the whether or not the customer has purchased items for a pre-selected group, exceeds a certain threshold (**quantity** or dollar amount), made purchases on certain dates, etc.. McCall recognizes that there may be more than one type of action that would trigger a discount and that there can be differing levels of discounts given to a given customer. The disclosure indicates that the specific conditions of the loyalty program can vary and are selected as desired by the retail operator. McCall is directed to an overall teaching of providing discounts for fuel purchases and this includes a discount given for the purchase of certain quantities being achieved. The claimed receiving of "*program sponsor data that includes an amount of a finder's fee paid by a*

program sponsor" is considered to be the discount amount that the customer is entitled to for the some various programs discussed by McCall, that is disclosed as being paid or subsidized by a third party (a program sponsor). With respect to the language about the fee being paid by a program sponsor, applicant is referred to column 12, lines 19-30, where it is disclosed that "*Pertaining to the discounts, a variety of arrangements are contemplated. Some examples entail the funding of the discount or reward by third parties other than the supplier of petroleum*". If a third party is funding the discount, the fee that they pay can very reasonably be considered a "finder's fee". The discounted amount for fuel purchases is paid to the program operator by the program sponsor (the third party) to more or less subsidize the discount that is given to the customer. The claimed step of receiving program sponsor data is the receipt of the information relating to the discounts given to customers and the amounts of those discounts paid by a program sponsor (the third part discussed in column 12).

For claim 115, in addition to that already addressed above, the claimed language of "on *establishment of an affinity relationship between the program sponsor and the customer*", this is taken as being directed to non-functional descriptive material. The limitation claimed is the receiving of program sponsor data that includes an amount of a fee (just a number). The language about when the fee was paid does not further add anything to the claimed step of receiving the program sponsor data. The timing of the paying of the fee is not given full weight because the only step actually claimed is the receipt of the information.

The rest of the language regarding the fee is directed to non-functional descriptive material.

Not disclosed is receiving *customer expected fuel usage data* that includes an *expected quantity* of fuel to be *purchased over a number of months* during which a *fixed guaranteed program price* will be given to the customer. Also not disclosed is the act of using the customer expected usage data along with the program sponsor data (subsidized discount given to customers) and the newly claimed "other customers conditions" to determine a *guaranteed fixed program price* for fuel, by using a processor.

McCall also does not disclose using the usage data and sponsor fee amount (data related to a fee to be paid by a third party) to develop *a financial hedging strategy* that can diminish the risk associated with the volatility of fuel prices.

McCall does not specifically disclose that the method of payment is ascertained.

With respect to having and receiving "*customer expected usage data*" that includes a quantity of fuel to be purchased over a given number of months, "Infinity" discloses what are known as energy future contracts. The reference specifically discloses that with respect to heating oil for homes, it is known to provide customers with guaranteed fixed program prices for their "annual consumption of fuel". This is done to some risk management control over the volatility of oil prices, as is discussed in the reference. The *expected quantity of*

fuel to be purchased is disclosed as the "annual consumption" that the user is going to consume. This is decided at before the year actually has occurred. The *number of months* is over a 12 month period as is indicated by the use of "annual consumption". The price that the customer receives is a *customer specific fixed guarantee program price* as claimed. The reference even refers to the customer price for heating oil as a *guaranteed* delivery price. With respect to providing McCall with a fixed guaranteed fuel program price over a given number of months, this would have been obvious to one of ordinary skill in the art. This is essentially taking the concept of providing a fixed guaranteed program price for heating oil and providing this feature to the loyalty program of McCall where vehicle fuel is disclosed. This is just another way one can structure the discount system and loyalty program of McCall with respect to quantity thresholds, one can do what Infinity teaches which is provide the customer with a guaranteed fixed price for their annual consumption of fuel. One of ordinary skill in the art would recognize that the two can be combined together and one would expect that the results obtained in Infinity would also be expected to be obtained in McCall. Additionally, the technical expertise exists to combine the two which amounts to nothing more than using the guaranteed program price of Infinity in the customer loyalty program of McCall where the customer of McCall can receive an annual guaranteed fixed price for their annual fuel consumption. Claiming in a combination, that which was previously known separately, where the results are predictable, is obvious to one of ordinary skill in the art. One of ordinary skill in the art would find it obvious to try adding a fixed guaranteed

program price to the loyalty program system of McCall in an effort to further attract customers. McCall discloses in column 2, lines 58-end, that information relating to fuel discounts is used by the retailer *to develop new marketing strategies*. The retailer is disclosed as needing to know if a given incentive program is working or not in order to determine if that program should continue, *or if the purchase criteria should be changed* to attract a larger number of customers. McCall recognizes that one of ordinary skill in the art is going to try different programs and approaches and will try out differing purchase criteria to more or less fine tune the program to be as successful as it can be. One of ordinary skill in the art of marketing and incentive programs is a person with some level of creativity on their own. McCall Column 10, lines 1-7 also discloses the fact that the retailer is going to analyze the data relating to the discounts so as to *adjust the program specifics as needed*. One of ordinary skill in the art would find it obvious to provide a fixed guaranteed program price for fuel to the overall incentive program of McCall in an effort to further attract customers and have a successful customer discount incentive program.

With respect to the claimed use of the "*program sponsor data*" (the claimed program price is based on the sponsor, i.e. how much they are subsidizing) and "*customer expected usage data*" to determine the guaranteed program price for fuel, this is considered to be obvious for the following reasons. Also addressed is the newly added limitation to "customer conditions". Any owner that sells fuel as McCall does, and that is looking at guaranteed price program such as disclosed by Infinity, is going to try to figure out as best they

can, what the quantity of fuel is that the customers will purchase (their annual consumption), fuel type, as well as how much money is coming in from the third party that may be paying the "finders fee". One of ordinary skill in the art that is concerned with fixed guaranteed prices to customers is obviously going to take into account how much fuel the customers are going to be expected to purchase (their annual consumption), fuel type, and how much other money the third party is paying (finders fee) towards the customer discount so that the fuel owner in McCall can determine their cost to arrive at a guaranteed price. The expected amount of fuel to be purchased annually necessarily affects how much fuel the retailer is going to have to commit to, which is a huge financial responsibility. A retailer may obtain a bigger discount from their fuel provider if the overall amount of fuel to be purchased is greater. The retailer also needs to ensure they do not buy too much fuel that exceeds the total expected amount. The retailer must have some idea of the quantity of fuel that their customers are negotiating to buy before the price can be set, because the price you agree to sell the fuel at is directly related to and dependent on the price that the retailer has to pay to obtain the negotiated quantity of fuel as well as how much the third party is paying for the finders fee. This is basic economics. This is also seen as the measuring of the demand for the discounted fuel (negotiated amount), and then using that demand information to calculate the fuel program price. It would have been obvious to one of ordinary skill in the art at the time the invention was made to take into account the quantity of fuel that the customer is expecting to purchase over the given amount of time (months) along with the program

sponsor data (which is like income to the retailer because the retailer is not paying for the discounts because they are paid by the third party) along with other information such as possibly the level of benefits or privileges the customer is entitled to (customer conditions), in order to calculate the program price for the fuel that is being negotiated. The claimed data that applicant is using to figure out the program price is the kind of data that one of ordinary skill in the art would be naturally concerned with. How much fuel you are committing to provide to customers, the time period over which this is to occur, other customer conditions (very broad language), and any other income that will offset the effective purchase price of the fuel (such as the third party paid discount amount) are all things that one of ordinary skill in the art would naturally want to take into account when determining the program price for fuel. Once the program price is determined, one of ordinary skill in the art would have found it obvious to store the number. This is desirable because this price is the agreed upon price that you are selling fuel to the customer at, where the customer has negotiated a certain volume of purchases, so you would clearly want to have a record of what that agreed upon price is. That is considered to be obvious. Also, in addition to that already addressed, the claimed use of “customer conditions” is a limitation that is considered to be broad. The claimed “customer conditions” is considered to be satisfied by any other information that one would take into account when determining a program price for fuel, such as is done in McCall by using the customer's membership status (benefits level) to offer discounts for fuel.

McCall does not disclose using the usage data, customer conditions, and sponsor fee amount (data related to a fee to be paid by a third party) to develop *a financial hedging strategy* that can diminish the risk associated with the volatility of fuel prices. The "Weather futures" article discloses the well-known concept of looking to the future to help protect against unnecessary losses due to factors that could be predicted to some extent. The article discloses that a natural gas company can "hedge" itself against lost revenues if a warm winter cuts sales. A hedging strategy for fuel is very old and well known, for example the futures market for oil, which helps reduce the risk due to changing fuel prices and market changes. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the customer expected usage data, customer conditions, and the program sponsor "finder fee", as well as any other data deemed as necessary or relevant data, to develop a financial hedging strategy to help prevent foreseeable losses due to changing demand and fuel prices. In the fuel market, any kind of extreme weather changes, or changes due to OPEC, other market forces, etc., impact the prices in the fuel markets. Developing a strategy that can predict upcoming conditions in the market so that you don't offer too low of fuel prices for the incentive program can protect against losses when the price for fuel goes up considerably and you are taking losses due to too liberal of an incentive program.

With respect to the limitation that recites that the calculating step is done by a "processor", the use of a processor is not explicitly disclosed in the prior art to arrive at the "guaranteed delivery price" that has been provided to McCall

(which is the claimed fixed guaranteed program price). The claimed processor could be simply a person using a calculator to do some mathematical calculations to arrive at a final price. The term "processor" is broad and arguably could be a person. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use a "processor", which can simply be a hand held calculator to calculate the guaranteed program price. Also, another interpretation is that a person is the claimed "processor" and that a manually arrived at price calculated by a person satisfies what is claimed. The prior art arrives at a guaranteed program price as is claimed, and it had to be calculated somehow.

With respect to ascertaining a mode of payment by the customer, this act reads on determining how the customer will pay for their fuel (credit card, debit card, cash, etc.). While this is not explicitly disclosed in McCall, when one is conducting a purchase transaction, it is very well known to determine how the payment will be made. It would have been obvious to one of ordinary skill in the art to figure out what the manner of payment for a given customer. This is something that is just common sense and flows from the fact that the fuel has to be paid for in some manner. To determine how the payment will be made is something that would have been obvious to one of ordinary skill in the art and reads on the act of determining if the payment will be made by cash, credit card, debit card, etc.. This involves much less than ordinary skill in the art.

For claim 55, in addition to that immediately above, the claimed step of "determining a market indicator relevant to the future price" is what you do when

you are developing a financial hedging strategy involving the sale of fuel. You are inherently looking to market indicators that are relevant to the future price for the fuel.

For claims 38,65,115, not disclosed is that the expected usage data includes a geographic region as claimed (cl. 115) and where multiple *prices are calculated for multiple geographic regions*. Because many gas stations are franchises that are located over many geographical areas, and in view of the very well known fact that gas prices vary by geographic region (California prices are higher than Virginia prices), it would have been obvious to one of ordinary skill in the art at the time the invention was made for a franchise owner (fuel provider) to obtain information on the usage area (which is broad enough it can be considered as the individual retailer location of McCall) and to calculate program prices for multiple geographic regions as claimed. If the retailer has a chain of stores that are location in different geographical locations, it would have been obvious to have different program prices because the price of the vehicle fuel is not going to be the same for all of the regions. It then follows that when developing the hedging strategy one would also take into account geographic factors that relate to the price of fuel.

With respect to claims 39,66, not disclosed is that the hedging strategy includes *purchasing futures for fuel*. The idea of purchasing "futures" in the fuel market is notoriously old and well known, and official notice is taken. This is also disclosed in the infinity reference. This is a way to try to predict what the market price for fuel is going to be in the future, hence the name "futures". It would have

been very obvious to one of ordinary skill in the art at the time the invention was made to have the hedging strategy include "futures" purchases as is well known in the art as a way to protect one from predicted rising prices for fuel.

With respect to claims 40,67, in the rejection of record the resulting guaranteed program price is going to be a price that is discounted when compared to a current price. That is what is meant by offering a discounted price, a price less than normal. Providing a fixed guaranteed program price for fuel as is set forth in the rejection is resulting in a discount to a non program price. Any guaranteed program discounted price is some percentage lower than the non program price. This fact is inherent to any two different prices, one price is a certain percentage lower than the other price.

With respect to claims 41,68, a capped price is still just a price. The program price of the prior art rejection is a capped price because that is the agreed upon price that a given quantity of fuel is to be sold at. This satisfies what is claimed.

4. Applicant's arguments filed 12/9/09 have been fully considered but they are not persuasive.

Applicant has argued that the examiner has not set forth the relevant teachings of prior art relied upon, and has not set forth the differences between what is claimed and what is disclosed in the prior art. This is not persuasive because the rejection sets forth the prior art relied upon, sets forth what is

disclosed by the prior art, and sets forth what any differences are from the prior art along with a clear explanation of why they are considered to be obvious.

With respect to the level of ordinary skill in the art, the cited references of record are seen as being representative of the level of ordinary skill in the art. To argued that applicant cannot reply to the rejections because the examiner has not set forth the level of ordinary skill in the art is not persuasive and is not addressing the rejection on the merits as far as the prior art is concerned.

Applicant has argued that the examiner has not provided prior art that discloses the use of customer expected fuel usage data, customer conditions, and the finders fee data in the hedging strategy. Applicant is not addressing the rejection of record where the examiner has provided a reasoned and articulated explanation of why the limitations are considered to be obvious. The examiner has set forth why one of ordinary skill in the art would find using the claimed data obvious and the examiner does not see where applicant has addressed this reasoning on the merits. Arguing that the examiner has not cited prior art is not persuasive and is ignoring and failing to address the rejection of record and the relied upon reasons for obviousness. Applicant's argument is more or less that the examiner must provide a printed prior art references that teaches what is alleged to be obvious if the rejection is to be sustainable. This argument or implication is not persuasive and is not correct in view of the somewhat recent KSR Supreme Court case. Applicant is not arguing the rejection on the merits in the opinion of the examiner. With respect to the argument for the program price calculation and the position that the examiner has not cited any references to

support the rejection, this argument is not persuasive. As stated above, applicant is not addressing the rejection of record where the reasoning and explanation of obviousness is explained in detail. Arguing that the examiner needs to cite a prior art reference is not persuasive. As applicant has argued, a rejection has to set forth why the claimed invention would have been obvious, and has to set forth an articulated and reasoned explanation with a rational underpinning to support the finding of obviousness. The examiner has done both. Applicant is simply not addressing the rejection on the merits.

With respect to the ascertaining a mode of payment limitation, this is addressed in the current rejection of record so no further comments are seen as necessary.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant has argued that it is impossible to understand the rejections due to the examiner not addressing the claimed limitations by not discussing them with any explanation. This is not persuasive and the examiner is at a loss as to what to tell applicant if they cannot understand the rejections of record. They are

clearly written and clearly address what is claimed, there is nothing further that the examiner can do to assist applicant's counsel in understanding the position set forth in the office action. This argument is not persuasive.

For claim 115 and the language relating to "establishment of an affinity relationship", the argument is not persuasive. The argued language defines nothing further to the step of receiving program sponsor data which is the only step claimed in that portion of the claim. Applicant is not claiming a step of actually establishing an affinity relationship, applicant is just reciting that the data is representative of a fee that is paid by the sponsor…, but that does not change the fact that all that is claimed is receiving program sponsor data. The language is still found to be non-functional descriptive material.

5. This is an RCE of applicant's earlier Application No. 09/853,196. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). The after final response filed 8/10/09 did not attempt to amend the claims and only presented a traversal; therefore, the current amendment was not the subject of an advisory action and was not denied entry by the examiner via an advisory action, so a First action Final rejection is proper.

6. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dennis Ruhl whose telephone number is 571-272-6808. The examiner can normally be reached on Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Janice Mooneyham can be reached on 571-272-6805. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Dennis Ruhl/
Primary Examiner, Art Unit 3689